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No. 08-305

IN THE
Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,
v.
T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawaii State Board of Education, and the board of education of the U.S. Virgin Islands. NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 49.8 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The American Association of School Administrators ("AASA"), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

The National Association of State Directors of Special Education ("NASDSE") is a not-for-profit organization established in 1938 to promote and

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[1] Pursuant to Sup. Ct. R. 37.6, amici note that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Sup. Ct. R. 37.3, counsel further notes that counsel of record for the parties have consented to the filing of this brief.

support education programs and related services for children and youth with disabilities. NASDSE's members include the state directors of special education in all 50 states, the District of Columbia, the Department of Defense Education Agency, the Bureau of Indian Education, federal territories and the Freely Associated States. NASDSE's primary mission is to support students with disabilities by providing services to state educational agencies to facilitate their efforts to maximize educational and functional outcomes for students with disabilities.

Amici regularly represent their members' interests before Congress and federal and state courts and have participated as *amicus curiae* in cases before this Court involving the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.* ("IDEA"). *See, e.g.*, *Bd. of Educ.* v. *Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam); *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291 (2006); *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49 (2005). *Amici* filed a brief in support of the petition for writ of *certiorari* in this very case.

Recognizing that all children with disabilities have a right to be provided with a free appropriate public education, NSBA, AASA and NASDSE have consistently supported the rights of disabled children. At the same time, *amici* are also fully cognizant of the substantial financial and human resources that public school districts devote each and every year to educating students with disabilities. These resources vastly exceed the partial funding provided by the federal government under IDEA. The burden on local school districts also is increased by an adversarial conception of IDEA, which exacts an even greater toll on limited educational resources and thus exacerbates the difficulty for school

districts in deciding what educational opportunities they can afford to provide for children.

NSBA, AASA and NASDSE, therefore, assign critical importance to the issue presented in this case: whether Congress in IDEA authorized tuition reimbursement for parents who unilaterally place their children in private schools, where those children have never previously received special education services from the public schools. Like the petitioner, amici contend that the answer is no.

SUMMARY OF ARGUMENT

In *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985), this Court held that private school tuition reimbursement was an available remedy under IDEA if a school district failed to provide a free appropriate public education to a child with a disability, even though the statute was silent on that point. Congress thereafter amended IDEA in 1997 to allow a tuition reimbursement remedy only where the child has "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).

The Ninth Circuit decision giving rise to this case, *Forest Grove Sch. Dist.* v. *T.A.*, 523 F.3d 1078, 1087 (9th Cir. 2008), ignored the plain language and clear intent of the 1997 amendment, and disagreed with Congress' policy choice in holding that "[f]or students who never received special education and related services * * *, the new provisions of § 1412(a)(10)(C) simply do not apply." To apply this section of IDEA to all parents and students seeking reimbursement

for private school tuition would, according to the Ninth Circuit, "lead to [an] absurd result." *Id.* The Court of Appeals erred. Because IDEA favors public school placements, establishes a collaborative framework that integrally involves parents and public school officials, and provides multiple methods for timely dispute resolution, Congress sensibly required parents to work with public school districts before being able to obtain unilaterally a publicly funded private school education.

Congress enacted the Education of All Handicapped Children Act of 1975 with the goal of opening "the door of *public* education to handicapped children"—not to provide publicly funded private school education to children with disabilities. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 192 (1982) (emphasis added). Renamed IDEA in 1991, the Act today continues to "ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). In accord with its fundamental purpose, virtually all of the Act's many substantive and procedural requirements apply only to public schools and protect only children attending public schools.

The Act also establishes a collaborative framework that requires ongoing cooperation between school districts and parents or guardians in developing, implementing, and refining, as the child develops, each student's educational program. Congress' decision to require parents to give this process a fair chance before being eligible for private school tuition reimbursement supports this overall framework. This structure depends upon the good faith participation of both school district personnel and the parents and guardians of disabled children. The

cooperative process results in the development, implementation and continuous adaptation of an individualized education program ("IEP") designed to ensure that each student receives a free public education that is appropriate to his or her individual needs. The process is dynamic; it gives parents multiple opportunities to effect a change in services they believe to be inadequate. These opportunities, along with the prompt dispute resolution mechanisms mandated by the Act, alleviate any fear that children with disabilities would be forced to languish for extended periods in inappropriate placements to preserve their entitlement to tuition reimbursement. By ignoring these aspects of the law, the Ninth Circuit's ruling seriously undermines IDEA's collaborative framework. Indeed, the Ninth Circuit's interpretation of IDEA would unfairly advantage parents who unilaterally place a disabled child in a private school and then litigate against the public school district later to obtain tuition reimbursement.

Reimbursing the cost of unilateral placements for parents who have not given a public school placement a fair chance—or as here, who have removed their children before they have even been identified as disabled—also would increase the already substantial costs of the Act. Litigation costs, of course, would increase. More expensive private school placements would be sought and approved. The federal government funds only about twenty percent of IDEA's cost, meaning that the inevitable result of increased costs would be to divert not only federal, but also state and local resources to private schools and diminish the funding available for special education and regular education programs in

public schools.[2]

By holding that § 1412(a)(10)(C)(ii) does not apply to parents who do not give public schools a fair chance to meet the needs of their disabled child or who have no genuine interest in obtaining a public education for that child at all, the Ninth Circuit's decision allows such parents to treat the IEP process merely as a means to a government-funded private school education. This expansion of school districts' obligations under IDEA is in contravention of the statute and should be reversed.[3]

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[2] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to IDEA in 1974, it currently funds less than 20 percent of those costs, creating a cumulative funding gap of more than $55 billion for the last four fiscal years. Ann Lordeman, *Individuals with Disabilities Education Act (IDEA): Current Funding Trends*, CRS Report for Congress (April 11, 2008). Even with the additional temporary funding to be provided under the American Recovery and Reinvestment Act of 2009, the gap will remain substantial.

[3] *Amici* also strongly support petitioner's argument that the question presented here must be decided in light of the obligations created under the Spending Clause which requires that "when Congress attaches conditions to a State's acceptance of federal funds" in IDEA, "the condition must be set out unambiguously." *Arlington Cent. Sch. Dist.*, 548 U.S. at 296 (internal quotations and citations omitted).

ARGUMENT

I. REQUIRING ALL PARENTS AND STUDENTS TO COMPLY WITH THE REQUIREMENTS OF SECTION 1412(a)(10)(C) IS CONSISTENT WITH THE PURPOSE AND STRUCTURE OF IDEA.

As part of its 1997 IDEA amendments, Congress sensibly adopted a threshold requirement for tuition reimbursement claims by parents who unilaterally place their children in private school: tuition reimbursement is only available for children who "previously received special education and related services under the authority" of the public school district. 20 U.S.C. § 1412(a)(10)(C)(ii). The plain language of this provision makes clear that where a child has not previously received special education from a school district, neither a court nor a hearing officer has authority to reimburse tuition expenses arising from a parent's unilateral placement of the child in private school. The amendment simply requires that parents of children with disabilities give public schools a realistic chance to serve their children before unilaterally rejecting what the public school offers—and forcing the school district to fund a private school education.

In addition to the threshold requirement, Congress determined that students who have previously received public special education services may be denied tuition reimbursement, in whole or in part, if the parents (1) failed to inform the student's IEP team that they were rejecting the proposed placement, (2) did not give written notice to the public agency ten days prior to removing the student from public school, (3) did not make the student

available for an evaluation, or (4) otherwise acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii). The Ninth Circuit concluded below not only that IDEA allows parents to receive tuition reimbursement for a disabled child who never received special education services from a public agency, but also that those parents are not subject to these statutory requirements.

The perverse outcome of this conclusion starkly demonstrates that the Ninth Circuit's interpretation of the law is flawed and inconsistent with the purposes and structure of IDEA. Under the Ninth Circuit's reading of the IDEA, parents who proceed consistently with IDEA's purpose and structure and in good faith place their disabled children in public school and work with the school to provide a free appropriate public education shoulder a greater burden when they determine that the public school is unable to serve their children than do parents who disregard IDEA's purpose and structure and never attempt to collaborate with the school district to develop an appropriate educational plan in a public school setting. This interpretation of the law, to favor parents of disabled students who never received special education services from a public school, ignores IDEA's fundamental goal of promoting public education for disabled students, seriously undermines IDEA's collaborative framework and disturbs the balance the Act seeks to strike between the interests of public schools and the interests of disabled students. Indeed, it is the Ninth Circuit's interpretation of the Act—placing a greater burden on those parents who seek to cooperate with the school district—that leads to "absurd results" rather than the straight-forward application of Congress' clear language limiting tuition reimbursement to those situations where the student has previously received special education or related

services from a public entity.

A. IDEA's History and Fundamental Requirements Show that Appropriate *Public* School Placements are Preferred.

The principal motivating force behind IDEA and its predecessor was to stop the exclusion of disabled students from *public* schools—not to increase the opportunity for disabled children to attend private schools at public expense. In the 1970s "the majority of disabled children in America were 'either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.' " *Schaffer*, 546 U.S. at 52 (quoting H.R. Rep. No. 94-332, at 2 (1975)). Congress' findings from the 2004 IDEA reauthorization re-emphasize this fact. Before the enactment of IDEA and its precursor, "the educational needs of millions of children with disabilities were not being fully met because * * * the children were excluded entirely from the public school system and from being educated with their peers." 20 U.S.C. § 1400(c)(2).

The purpose of IDEA was "to reverse this history of neglect" and bring students with disabilities into the mainstream of the public school community. *Schaffer*, 546 U.S. at 52. This purpose is readily apparent: "the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the *public education systems* of the States." *Rowley*, 458 U.S. at 189 (emphasis added).

The Act's "least restrictive environment" ("LRE") mandate, also known as its "mainstreaming" requirement, further underscores IDEA's goal of promoting public school access for children with disabilities. 20 U.S.C. § 1412(a)(5). Through this requirement, the Act incorporates a strong preference that, whenever possible, children with disabilities attend schools and classes with children who are not disabled—giving rise to "a presumption in favor of placement in the public schools." *T.F.* v. *Specialty Sch. Dist. of St. Louis County*, 449 F.3d 816, 820 (8th Cir. 2006) (parents not entitled to reimbursement for private school residential placement at annual cost of $100,000 where IEP offered a mix of services in public school and a private institutional setting).

Given this presumption, a school district may only resort to use of a private school to educate a child with a disability when "public educational services appropriate for the handicapped child are not available." *Hessler ex rel. Britt* v. *State Bd. of Educ.*, 700 F.2d 134, 138 (4th Cir. 1983). The public school has a duty to provide services to the student and to include the student in the public school community to the maximum extent practicable.

The Ninth Circuit's interpretation of IDEA, which advantages parents who never work with the public school district to attempt to include their disabled child in a public school program tailored to their child's needs, is contrary to the well-established preference in the IDEA for public schooling of disabled children wherever possible. Indeed, it eviscerates the LRE mandate by allowing parents to obtain public funding for a private school placement without ever trying the public school program.

B. IDEA Establishes a Collaborative Framework for Parents and Public Schools to Work in Tandem to Ensure Appropriate Educational Programs for Children with Disabilities.

The "core of [IDEA] * * * is the cooperative process that it establishes between parents and schools." *Schaffer*, 546 U.S. at 53. *See also Rowley*, 458 U.S. at 205-206 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). The collaborative decision-making process at the heart of IDEA is undermined when parents do not cooperate in good faith with school districts. Congress' decision to require parents at least to attempt to ensure an appropriate public school placement before they are eligible for private school tuition reimbursement fosters just such good-faith collaboration. The Ninth Circuit's interpretation of IDEA, however, will encourage parents not to collaborate with public school districts because to do so will disadvantage them if they later seek private-school tuition reimbursement.

As the Court recently stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 546 U.S. at 53. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d); *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). Likewise, the determination of whether a student is disabled as defined by the Act and therefore entitled to special education services, is made by "a team of qualified professionals and the parent of the child." 20 U.S.C. § 1414(b)(4).

Parents are also involved in an ongoing process of evaluating the implementation of the child's educational program and revising IEPs. Whenever parents believe during a school year that their child's IEP requires revision because of, for example, "any lack of expected progress" or "the child's anticipated needs," they may request that the IEP team review the IEP and consider revising it to meet the child's needs. 20 U.S.C. § 1414(d)(4)(A). Or the parents and the school district may agree to develop a written document amending the IEP during the school year without convening an IEP meeting. 20 U.S.C. § 1414(d)(3)(D). And at least annually the whole IEP team, including the parents, formally reviews whether the plan's goals are being achieved and revises the IEP as needed. 20 U.S.C. § 1414(d)(4)(A). The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3-4).

When a child has never received special education services from the public school system, requiring parents to request an evaluation—before placing their child in private school—to determine whether their child is disabled and eligible for services under the IDEA is entirely consistent with the collaborative model established in the IDEA. Likewise, requiring parents at least to try the services recommended by an IEP team before rejecting them in favor of a private placement furthers this collaborative model. Indeed, parents who actually try the individualized education program offered by the public school may find that it meets their child's educational needs. Moreover, requiring parents to work in good faith with school staff recognizes that providing a free appropriate public education to any given child may require an ongoing process of adaptation. *See, e.g.,*

Honig, 484 U.S. at 321 (referring to "inescapable fact that the preparation of an IEP * * * is an inexact science at best"). By contrast, to allow parents to obtain tuition reimbursement where, as here, they initially agreed that their child was ineligible for special education, only to later request an evaluation and a due process hearing after removing the child from public school, would belittle both the cooperative approach of IDEA and the complexity of educating disabled students.

IDEA's emphasis on prompt cooperative solutions imposes obligations on school districts and parents alike to ensure their good faith commitment to a truly collaborative process. The 1997 IDEA amendments, for example, included a number of provisions that made some of the procedural duties of parents quite explicit. Requiring cooperation in these smaller ways would make little sense if the Act entitles parents who abandon public schools before even challenging whether their child was eligible for services, or who reject a proposed placement without trying the services offered by the public school district, to receive tuition reimbursement.

The 1997 amendments, for example, added a provision indicating that reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. 20 U.S.C. § 1412(a)(10)(C)(iii)(I). Therefore, before removing a child from a public school, parents must inform the IEP team that they are rejecting the proposed placement, state their concerns with the proposal, and indicate their intent to enroll their child in a private school at public expense. 34 C.F.R. § 300.148(d). In addition, parents must give the school district written notice of these factors at least

ten days prior to removing their child from a public school. *Id.* The reason for this is clear: Without a good faith commitment to the process by all parties, true collaboration in determining the development and implementation of a free appropriate public education would not be possible. *See, e.g.*, *M.S. ex rel. M.S.* v. *Mullica Twp. Bd. of Educ.*, No. 06-533, 2007 WL 1096804 (D.N.J. Apr. 12, 2007), *aff'd*, 263 F. App'x 264 (3d Cir. 2008) (parents' refusal to cooperate prevented creation of appropriate IEP). If rejecting a placement requires timely notice and a list of reasons to ensure a collaborative process, then not even attempting to secure services under IDEA before removing the child from public school is the antithesis of this collaborative process.

School districts, too, share an obligation under the Act to attempt in good faith to identify and evaluate children in need of special education and to negotiate workable IEPs—and to agree to private placements when they cannot. School districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. *See* 20 U.S.C. § 1412(a)(10)(B). In 2005, for example, there were 88,098 students with disabilities educated in private schools at public expense. *See* U.S. Department of Education, IDEA data, Table 2-5: Number of students ages 6 through 21 served under IDEA, Part B, in the U.S. and outlying areas, by disability category and educational environment, Fall 1996 through Fall 2005, *available at* https://www.ideadata.org/tables29th/ar_2-5.htm [hereinafter IDEA data]. The overwhelming majority of these placements were ones that school districts agreed were appropriate to ensure the child in question received the education mandated by IDEA. School districts thus voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements—which

occur when the collaborative process established by the Act is operating as it is intended.

C. IDEA Provides Numerous Effective Procedural Protections to Parents and Students that Ensure Quality Education and Prevent "Absurd Results."

The fundamental goal of IDEA is a "free appropriate public education" in the "least restrictive environment" for all students with disabilities. 20 U.S.C. §§ 1400(d)(1)(A), 1412(a)(5). IDEA establishes procedural rights and obligations for parents and school districts alike to achieve that goal in a manner that ensures educational opportunities for disabled children while recognizing the financial costs entailed. *See Arlington Cent. Sch. Dist.*, 548 U.S. at 303 ("the IDEA is not intended in all instances to further [its] broad goals * * * at the expense of fiscal considerations"). To require school districts to reimburse the cost of private school tuition without first affording the district the opportunity to provide special education and related services ignores the equally important interests of school districts and parents that IDEA seeks to balance through carefully constructed procedural rights and obligations.

The Act imposes numerous procedural obligations on public school districts to ensure prompt resolution of disputes, in the event that the collaborative approach is unsuccessful. Under IDEA, school districts must respond to parents' complaints within a short timeframe. Indeed, since the adoption of Section 1412(a)(10)(C)(ii), Congress has tightened the deadlines for school districts. For example, when a school district receives notice of a due process

complaint, it has only ten days to explain to the parents why it has proposed or refused to take the action at issue. 20 U.S.C. § 1415(c)(2)(B)(i)(I). Within 15 days, the school district must convene a meeting with the parents and relevant IEP team members, at which the parents and child are given an opportunity to discuss their complaint and try to resolve the dispute amicably. *Id.* § 1415(f)(1)(B). If the complaint is not fully resolved within 30 days, a due process hearing must be scheduled. *Id.* The Act also provides parents and guardians with a right to publicly funded, confidential mediation. *Id.* § 1415(e). All these protections apply both to parents who are challenging an IEP, and to parents who dispute the school district's determination that a child is not eligible for special education services.

Likewise, the 1997 IDEA amendments that explicitly place certain procedural duties on parents, also further prompt dispute resolution through a collaborative method whenever possible. For example, the 1997 amendments specify that private school tuition reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove a child from public school before they do so. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.148(d). These procedural safeguards emphasize that school districts should be given an opportunity to provide a free appropriate public education before parents are able to obtain tuition reimbursement for a unilateral private school placement.

The Ninth Circuit found that interpreting section 1412(a)(10)(C) to apply to all parents—including those who remove their children from public school before the school district identifies them as disabled pursuant to IDEA—would lead to "absurd result[s]"

because the "student would *never* receive special education in public school and therefore would *never* be eligible for reimbursement under § 1412(a)(10)(C)(ii)." *Forest Grove Sch. Dist.*, 523 F.3d at 1087. The Ninth Circuit's conclusion that it is absurd to apply the plain language of the IDEA to all parents seeking a publicly funded private education is incorrect. First of all, the IDEA provides parents, like those of T.A., with a procedural avenue to obtain prompt review of the school district's eligibility determinations. For example, T.A.'s parents could have challenged the school district's determination that T.A. was not disabled when he was attending public school in June of 2001. Had the parents requested a due process hearing at that time, an impartial hearing officer could have found that the school district erred in its eligibility determination and required the school district to prepare an IEP for T.A. by the fall of 2001—the beginning of T.A.'s tenth-grade school year. *See* 34 C.F.R. §§ 300.510(b)(1)-(2), 300.515(a) (hearing officer must issue decision within 45 days of 30-day period following filing of due process complaint). If T.A.'s parents remained dissatisfied with that IEP after giving it an opportunity to work, and they met the additional provisions Congress included in § 1412(a)(10)(C)(iii), they would then be eligible for tuition reimbursement if the hearing officer (or the federal courts) subsequently determined that the proposed IEP was not reasonably calculated to provide FAPE. If T.A.'s parents made such a showing to the hearing officer, they potentially could have been eligible for tuition reimbursement by mid-way through T.A.'s tenth-grade year.[4]

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[4] No due process hearing was requested by the parents in 2001, however, because T.A.'s mother *agreed* with the school district

Second, there is nothing "absurd" in interpreting the plain language of the IDEA to require that parents work cooperatively with school districts before being eligible for tuition reimbursement, and that such cooperation is required prior to obtaining private school tuition reimbursement, even where the student has not been identified for special education services by the school district before the parents unilaterally remove him from the public schools. Among the bedrock principles of the IDEA is that it presumes that school district officials are the experts in educational matters and their judgment in such matters is due deference by the courts. *See Schaffer*, 546 U.S. at 59 ("IDEA relies heavily upon the expertise of school districts to meet its goals"); *id.* at 62-63 (Stevens, J., concurring) ("I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute"). That deference here translates into presuming that a school district that finds a student ineligible for special education services has done so in good faith, applying its best professional judgment. Similarly, requiring parents of children who have been found eligible for services to work with the school district to develop and try an IEP before obtaining a publicly funded private education is completely consistent with IDEA's collaborative process and the deference owed to the professional judgment of educators, who are entitled to this presumption of good faith.

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that he did not "have a learning disability and * * * was ineligible for special education." Pet. App. 39a n.3 (quoting Exhibit 1 to Amended Complaint). Of course, T.A.'s parents could have challenged not only the school district's 2001 determination of eligibility but also could have challenged the areas in which the school district assessed T.A. in making its determination. *See* 20 U.S.C. § 1414(b)(3)(B).

Indeed, interpreting IDEA to not apply the limits in § 1412(a)(10)(C) to parents and students who never receive special education or related services from a public entity leads to absurd results because it flouts the IDEA's procedural safeguards and the balance IDEA seeks to achieve. Such an interpretation would place more statutory requirements for private school tuition reimbursement on parents who have worked with the public school system to obtain special education services from a school district than on those who have never attempted the collaboration required by the statute. Such an interpretation can only encourage parents not to work within the framework of IDEA to develop a plan for a free appropriate public education for their disabled children. Such a message is completely antithetical to Congress' intent. *See Schaffer*, 546 U.S. at 60 ("Congress appears to have presumed * * * that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances.") (citing *Rowley*, 458 U.S. at 206).

II. THE NINTH CIRCUIT'S RULING DISTORTS THE DISPUTE RESOLUTION PROCESS UNDER IDEA AND DISRUPTS EFFECTIVE ADMINISTRATION OF SPECIAL EDUCATION SERVICES.

A. Parents Would Obtain an Unfair Litigation Advantage by Refusing to Give School Districts an Opportunity to Attempt to Provide a Free Appropriate Public Education.

The advantages provided by an interpretation of IDEA that permits parents to obtain private school

tuition reimbursement when they unilaterally place their child in private school without first receiving special education services from the public school district go beyond those parents' ability to avoid procedural requirements in IDEA with which parents whose children have received public special education services must comply. As a practical matter, parents whose children have not received public special education services will also benefit from an advantage in any later administrative proceeding or litigation with the school district.

Under an interpretation of IDEA that provides that parents whose children never obtained special education or related services from a public agency need not comply with any of the requirements of § 1412(a)(10)(C), the school district will sometimes not even have the opportunity to evaluate the child, much less develop an IEP, until after the child is in a private school, because parents will not have to give notice that they intend to place their child in a private school. The ensuing evaluation and any development of an IEP inevitably would occur under an adversarial shadow, with the parents' rejection of any determination of ineligibility or offer of an IEP public placement already set and the occurrence of a due process hearing a foregone conclusion.

Under such circumstances, a school district knows that any determination that the child is ineligible for special education services will place it in an extremely weak position should the independent hearing officer disagree. It will not only be found to have denied FAPE by its ineligibility finding but also will not have developed an IEP that can be examined to determine the appropriateness of a public placement and offered services.

Where the school district has already determined prior to the parents' unilateral removal that a child is eligible for special education, unilateral refusal by parents to try an IEP means that school officials are never given the opportunity to make (or refuse to make) changes depending on how a child responds to the IEP that was developed. If a problem with the IEP becomes apparent, school districts need to be able to investigate and respond to the problem—before being saddled with tens of thousands of dollars in tuition reimbursement. *See M.C. ex rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) (district "may not be able to act immediately to correct an inappropriate IEP; it may require some time to respond to a complex problem"). Moreover, in some circumstances, a school district not only should have the opportunity but also may have the duty to try a less restrictive public school placement before agreeing to a more restrictive private school setting. *See*, *e.g.*, *T.F.*, 449 F.3d at 821 ("district should have had the opportunity, and to an extent had the duty, to try these less restrictive alternatives before recommending a residential placement").

When parents unilaterally place their child in a private school without determining whether their child is even eligible for an IEP, or before implementation of a collaboratively developed IEP, school districts are thus denied the ability to litigate the case on an even footing with the parents. Parents challenging an IEP have the burden to prove that a school district's proposed public placement is inadequate under IDEA, *Schaffer*, 546 U.S. at 62, but the distinct evidentiary advantage that the parents' action provides them tempers such burden. For example, where eligibility is contested, the due process hearing officer will be weighing the district's determination of ineligibility, (*i.e.*, its intent to offer

no special education services), against the parents' claim that their child is in need of services as reinforced by evidence of how well the child is doing while receiving the panoply of services available at the private placement. Where eligibility is not at issue, the hearing officer is forced to evaluate in a vacuum whether the IEP is reasonably calculated to provide some educational benefit to the child because the child has no experience with the public school educational plan. This necessitates an abstract inquiry. Although an IEP is supposed to be judged prospectively as of the time it was developed, in many cases, the parents point precisely to how the child is doing in the private placement as some sort of "proof" of their speculation that the public placement was insufficient. *See, e.g., Konkel v. Elmbrook Sch. Dist.,* 348 F. Supp. 2d 1018, 1023 (E.D. Wis. 2004); *Justin G. ex rel. Gene R.* v. *Bd. of Educ. of Montgomery County*, 148 F. Supp. 2d 576 (D. Md. 2001). In addition to encouraging improper "Monday morning quarterbacking" of the IEP developed by the public school, the parent's "proof" of private school success is meaningless in the absence of having tried the public placement.

The Ninth Circuit's interpretation of IDEA thus allows, and even encourages, parents and their attorneys to sit back and never even try to obtain an IEP in hopes that the school district members of an IEP team will, in the opinion of a hearing officer, incorrectly conclude their child is not disabled. In such a situation, the school district is not given the opportunity to produce an IEP and demonstrate that it would work; rather, the parents effectively need only show that the private placement is appropriate. At a minimum, parents and their attorneys will be more able to convince a hearing officer or administrative law judge that the school district's determinations were incorrect, a process made easier

by asking the hearing officer to compare the school district's proposed program, or lack thereof, to the private school's actual program. In contrast, for a student who has attended the public schools, has gone through the evaluation process, been identified as disabled, and has tried the IEP proposed by the school district, the school district will be able to provide evidence at an administrative hearing of its actual efforts with the student, including the modifications it has made in response to concerns expressed by the parents, rather than just a written evaluation or IEP on a piece of paper. It cannot be that in amending IDEA to include § 1412(a)(10)(C), Congress intended to provide such an advantage to families who never try to work with the public school system in obtaining public special education services for their children through the IDEA.

B. Allowing Unilateral Private Placements for Students Who Never Have Received Special Education Services from a Public School Undermines School Districts' Ability to Accurately Budget for and Provide Special Education Services.

The Ninth Circuit's interpretation of IDEA also hampers school districts' ability to provide appropriate special educational services to public school students. By encouraging unforeseeable unilateral private school placements, the decision below would undermine school districts' already difficult budgeting process.

Budgeting for special education services is already

a difficult process.[5] These costs have been described as the "wild cards in school district budgets," because they are based on particular needs of specific students and can change from year to year. Melanie Asmar, *Special Education Costs Soar; Unpredictable Bill Can Strain Local Districts,* Concord Monitor, Feb. 17, 2008. In addition, the costs of private placements for special education students can be particularly expensive. While the residential program for which respondent sought reimbursement here cost more than $5,000 per month—or approximately $45,000 per year—costs for some private placements can be "as much as $100,000 per year." *Id.* As one superintendent explained, "You really can have just a few very high-cost students come into your district and have a huge impact on your cost per pupil." Meaghan M. McDermott, *Special Ed*, Rochester Democrat and Chronicle, Dec. 2, 2007, at 1A.

The Ninth Circuit's ruling that § 1412(a)(10)(C) does not apply to a student who never received special education services from a public school district makes an already difficult budgeting process for public school districts even more unpredictable. School districts are simply unable to estimate possible costs associated with private placements where they have no means of determining the number of students who might be eligible for private school reimbursement, and where decisions as to whether or not reimbursement is appropriate are based on indeterminate notions of equity rather than

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[5] School districts spend more than $6.7 billion annually on assessments, evaluations, and IEP-related activities alone. *See* Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Special Education Services in the United States, 1999-2000, Rpt. 1* at 13-14 (June 2004), *available at* http://csef.air.org/publications/seep/national/AdvRpt1.pdf.

statutory rules and procedures. Rather than having advance notice and an opportunity to plan ahead in budgeting for a student whom the public school district has attempted to serve, the Ninth Circuit rule means that school districts will be hit after-the-fact with potentially large tuition reimbursement claims for private placements of students who the school district did not even know might require such services.

The budgeting challenges in this case exemplify the problem. How could the school district have suspected in 2001, after T.A.'s mother *agreed* with the district that he was ineligible for special education services, or even in March of 2003, when the district assisted T.A.'s father in arranging a placement at Portland Community College while T.A. was dealing with drug problems, that later in 2003, T.A. would be in a residential placement costing $45,000 a year for ADHD?

III. PERMITTING REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENTS MADE BEFORE THE CHILD EVER RECEIVES SPECIAL EDUCATION SERVICES FROM A PUBLIC SCHOOL WOULD INCREASE LITIGATION COSTS AND DIVERT RESOURCES FROM EDUCATION.

A. Litigation Costs Under IDEA Are High.

Litigation costs under IDEA are often prohibitive for school districts. In 1999-2000, the average cost of a litigated case was $94,600 for the year. Jay G. Chambers, *et al.*, American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000*, *Rpt. 4* at 8 (May

2003), *available at http://csef.air.org/publications/-SEEP/national/Procedural%20Safeguards.pdf* [hereinafter Chambers, Procedural Safeguards]. Congress is aware of this problem and has been trying to rein in these costs. As a Senate Report from the 1997 amendments makes clear, "[t]he growing body of litigation surrounding IDEA is one of the unintended and costly consequences of this law." S. Rep. No. 104-275, at 85 (1996).

Yet school districts are pushed to litigate as more and more parents seek reimbursement for expensive private school placements for their children. The costs of reimbursing parents for private school placements, such as respondents seek here, average more than $26,000 per student–more than four times the cost of public placements. U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of IDEA*, I-30 to I-31 (2002). And in roughly the last decade, the number of private placements has increased at more than *twice* the pace that the number of special education students has increased. According to the United States Department of Education, 88,098 students with disabilities were educated in private schools at public expense in 2005. From 1996-2005, while the number of children ages 6-21 who receive special education and related services for all disabilities rose by 17% across the Nation, the number of children in publicly funded private placements rose by over 34%. *See* IDEA data, *supra*, at Table 2-5.

Even if parents and the school district can resolve conflicts regarding special education services prior to litigation, due process hearings and mediations themselves add significant costs to school districts' special education budgets. In 1998-1999, more than 6,750 due process hearings and 4,250 mediations were held. *See* Chambers, Procedural Safeguards,

supra, at 8. And on average, schools spent $8,160-$12,200 for *each* due process hearing or mediation. *Id.* Given that the average per pupil expenditure for special education services is about $8,000, a due process hearing or mediation effectively doubles a school district's cost to educate a single disabled child. *See id.* at 3; U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-22, I-26 (2002).

School districts do not engage in these expensive disputes to avoid providing appropriate education to special needs students; indeed, more than 55% of resolved due process hearings and litigation cases are decided entirely in favor of the school district, while 65% of due process hearings and 83% of litigation cases result in at least a partial victory for the district. *See* Chambers, Procedural Safeguards, *supra*, at 20. Every dollar a school district spends on private placements and litigation to avoid unnecessary private placements is a dollar less for providing special education and related services to students in the public schools. Under certain circumstances, private placements and related costs to the school district may be appropriate, but the costs of special education supports an interpretation of IDEA that does not encourage parents to avoid IDEA's collaborative framework and to sue the school district for private school reimbursement.

B. The Ninth Circuit's Decision Will Encourage Litigation.

The 2004 amendments contain several provisions designed to "[r]estor[e] trust and reduc[e] litigation" under IDEA and to alleviate the "excessive litigation under the Act." H.R. Rep. No. 108-77, at 85, 116 (2003). *See, e.g.*, 20 U.S.C. § 1415(b)(7)(A) (notice

requirements for complaints); 20 U.S.C. § 1415(b)(6)(B) (statute of limitations); 20 U.S.C. § 1415(e) (mediation and nonbinding arbitration); 20 U.S.C. § 1415(i)(3)(B) (attorney's fees for frivolous claims); H.R. Rep. No. 108-77, at 85-86 (discussing new provisions). But ruling that *Burlington School Committee* v. *Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four* v. *Carter*, 510 U.S. 7 (1993), are not limited by Section 1412(a)(10)(C)(ii) would only result in a continued flood of private school parents seeking to play in a tuition-reimbursement lottery, regardless of their interest (or lack thereof) in securing a public education for their children. It would place school districts nationwide, many of them small and financially strapped, in the untenable position of being forced to choose between an expensive private school placement on the one hand and costly litigation on the other.

The reality is that the Court's holdings in *Burlington* and *Carter* exploded the number of tuition reimbursement cases that school districts must litigate, mediate, or settle. And if parents are free to unilaterally place their children in private schools and then seek reimbursement, without ever trying the public school's program (or in this case, even requesting an evaluation, informing the school of an alleged deficiency under IDEA or working with the school to create an individualized program), that number will expand exponentially. IDEA is intended to ensure a free and appropriate *public* education for students with disabilities—resort to a private placement is permissible only in extraordinary circumstances. Allowing private tuition reimbursement in cases where the child has not previously received special education services in the public schools would work against the intent of the Act, forcing school districts into a no-win choice

between expensive litigation and expensive private placements and offering windfalls to parents who prefer private schools.

CONCLUSION

For the foregoing reasons, as well as those stated by petitioner, *amici* respectfully request that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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